BALWANT SINGH PURBA

v.

R. RAJASINGAM

HIGH COURT MALAYA, PENANG
LIM BENG CHOON J
[CIVIL SUIT NO. 22-81-86]
13 MAY 1987

CIVIL PROCEDURE: *Cross-examination - Application to set aside interim injunction - Affidavit in support of application - Whether plaintiff can cross-examine defendant on his affidavit - Principles applicable.*

The plaintiff filed an action against the defendant, claiming *inter alia* that the defendant is liable in a tortious act of assault which is said to have been perpetrated on the plaintiff. He also prayed for an injunction restraining the defendant by himself or his agents and/or servants or otherwise from further howsoever assaulting or harassing the plaintiff.

By an *ex parte* application filed, on the same day, the plaintiff obtained an order, on 18 December 1986, for an interim injunction to restrain the defendant from assaulting or harassing the plaintiff pending the disposal of the civil suit.

On 30 December 1986 the defendant made an *inter parte* application to set aside the order of the interim injunction. Two weeks later the plaintiff made an *inter parte* application to obtain leave to cross-examine the defendant on the assertions set forth in his affidavit pursuant to O. 38 r. 2(3) of the Rules of the High Court 1980.

Held:

[1] The power as confirmed by O. 38 r. 2(3) is obviously a matter of discretion to be exercised only in respect of an issue which the Court is asked to determine in the interlocutory proceedings and not in respect of any other issue which should be determined at the trial of the action proper.

[2] As the purpose of the cross-examination of the defendant on his affidavit was nothing more than to find out whether the defendant did or did not act so aggressively as to constitute a threat amounting to an assault in law, the plaintiff is not entitled to invoke the said O. 38 r. 2(3). Such matters cannot be considered at this juncture as they are matters which can only be tried in the action proper.

[3] The Court therefore disallowed the application of the plaintiff to cross-examine the defendant on his affidavit.

[Application to cross-examine disallowed. An order that costs of proceeding be paid to defendant.]

Cases referred to:

Abraham & Co. v. Dunlop Pneumatic Co. [1905] 1 KB 46
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Government of Pakistan v. Seng Peng Sawmills Sdn. Bhd. & Ors. [1979] 1 MLJ 219
Comet Products v. Hawkex Plastics Ltd. [1971] 2 QB 67
Gomez v. Gomez [1969] 1 MLJ 228

Legislation referred to:

Rules of the High Court 1980, O. 38 r. 2(3)

Other sources referred to:
English Supreme Court Practice, (1979), Vol. 1, p. 592
English and Empire Digest Replacement, 1971, Vol. 28(2), p. 1121

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - R.R. Chelliah; M/s. R. Rajasingam & Co.

JUDGMENT

Lim Beng Choon J:

This is an application made by the plaintiff for leave pursuant to O. 38 r. 2(3) of the Rules of the High Court 1980 to cross-examine the defendant in respect of the affidavit made by him in support of his application to set aside the interim injunction granted by this Court on 18 December 1986. I dismissed this application after hearing the submissions of Counsel of the respective parties. The plaintiff now appeals against my decision.

To be able to understand the arguments of both the learned Counsel, it is necessary to mention briefly how the matter arose. On 17 December 1986 the plaintiff instituted an action registered as Civil Suit No. 22-81-86 at the High Court of Malaya at Penang. Among other things, the plaintiff claimed that the defendant is liable in a tortious act of assault which is said to have been perpetrated on the plaintiff and he prayed for an injunction restraining the defendant by himself or agents, and/or servants or otherwise from further howsoever assaulting or harassing the plaintiff. On the same day the plaintiff made an *ex parte* application by way of summons-in-chambers for an interim injunction to restrain the defendant from assaulting or harassing the plaintiff pending the disposal of this civil suit. His application was allowed and an order was made granting him the interim injunction as prayed for on 18 December 1986. On 24 December 1986 the defendant entered an appearance to the writ of summons and on 30 December 1986 he made an *inter parte* application by way of summons-in-chambers (encl. 7) to set aside the order of the interim injunction granted on 18 December 1986. In support of his application the defendant also filed in the statement of defence to controvert the averments contained in the plaintiff's statement of claim. A week later the plaintiff made an *inter parte* application again by way of summons-in-chambers (encl. 15) to obtain leave from this Court to cross-examine the defendant on the assertions set forth in his affidavit affirmed on 29 December 1986 pursuant to O. 38 r. 2(3) of the Rules of the High Court 1980 which reads as follows:

> The Court may on the application of any party, order the attendance for cross-examination of the person making any such affidavit ...

There is no dispute that the power given by the said O. 38 r. 2(3) is obviously a matter of discretion to be exercised by a Court in accordance with well-known judicial principles. For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p. 592 of the English Supreme Court Practice [1979] Vol. 1:

> There is a discretion as to ordering cross-examination on affidavits filed on interlocutory applications. Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare.

The second principle is that the power as conferred by the said O. 38 r. 2(3) can be invoked only in respect of an issue which the Court is asked to determine in the interlocutory proceeding and not in respect of any other issue which should be determined at the trial of the action proper. In this connection reference may be made to *Abraham & Co. v. Dunlop Pneumatic Co.* [1905] 1 KB 46 @ 52 where Mathew LJ said:

> That applies only to a question of fact which the Court or a Judge has at the time jurisdiction to decide, and not to a question to be tried in the action. The question under which this appeal arises relates to an issue in the action which must be tried in the action with the other issues, and is not a matter that can be determined at chambers.

Applying the aforesaid principles to the present case, it is obviously indisputable that the proceeding in hearing the application of the defendant to set aside the interim injunction is an interlocutory proceedings. It is equally indisputable that the sole issue in this interlocutory proceeding is whether or not the said interim injunction granted by this Court should be set aside. In determining the issue, the cardinal question to be asked is whether the plaintiff has sufficiently established by his averments in his statement of claim a serious question to be tried and if there is this Court should then and only then consider whether on the balance of convenience, the plaintiff would be adequately compensated by damages if he succeeds at the trial proper. Likewise if the interim injunction is to be refused the Court would also have to consider on the balance of convenience whether the defendant would be adequately compensated by damages should the plaintiff lose the final action - see *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 and *Government of Pakistan v. Seng Peng Sawmills Sdn. Bhd. & Ors.* [1979] 1 MLJ 219. It follows from these discussions that in the present case this Court must scrutinise the averments in the Statement of Claim of the plaintiff to find out whether he has established a serious question to be considered in his allegation of assault by the defendant. It is only when this Court is satisfied that he has established his case within this context, then and only then the subsidiary question of "balance of convenience" need be taken into consideration.

Mr. Karpal Singh, Counsel for the plaintiff, with his usual candour informed this Court that the reason for the plaintiff's invocation of the said O. 38 r. 2(3) to cross-examine the defendant was to find out whether on the day in question, the incident averred by the plaintiff in para. 4-14 of his statement of claim did or did not take place. In other words, the purpose of the cross-examination of the defendant on his affidavit is nothing more than to find out whether the defendant did or did not act so aggressively as to constitute a threat amounting to an assault in law. With due respect to the learned Counsel, I do not think that the plaintiff is entitled to invoke the said O. 38 r. 2(3) solely to support his allegations as averred by him in the aforementioned paragraphs of his statement of claim. Such matters cannot be considered at this juncture as they are matters which can only be tried in the action proper. At any rate as I have stated earlier whether there is a serious question to be tried to sustain the issue of an interim injunction can be gleaned from the pleadings of the plaintiff. To allow the plaintiff to cross-examine the defendant on his affidavit would at the best have a very small relevance to the issue which I have to decide. If the cross-examination were to be pursued I can see question after question put and objection after objection raised extending over a long time. On this point some useful assistance can be derived from the judgment of Megaw LJ in *Comet Products v. Hawkex Plastics Ltd.* [1971] 2 QB 67 @ 77 where His Lordship said:

> What weight it will have must depend on the circumstances of the particular case. In some cases it may have little or no weight. One feature which may make it of substantial weight is when it becomes apparent that the necessary result of the cross-examination, while the cross-examination is perfectly properly conducted, is likely at the best to have a very small relevance to the issue which the Judge has to decide in comparison with the effect it may have on the matter in the litigation, which are not properly in issue on the contempt motion.

In further support of the view I have taken reference may be made to the following two authorities. In *Normanville v. Stanning* as reported in the English and Empire Digest Replacement Vol. 28(2) 1971 Reissue at p. 1121 Case No. 1178 it is stated:

On a motion to dissolve an injunction to stay proceedings at law pltf. in equity had no right, under 15 & 16 Vict.c.86, s. 40(repealed), to require that the motion should stand over in order that he might examine orally witnesses who had made affidavits for deft.

The second authority is *Mayer v. Spence* reported in the same Volume of the English and Empire Digest in the same page Case No. 1179:

In an injunction suit to restrain the infringement of a patent, a plt. moving for leave to proceed at law must file an affidavit of his belief in his title & in the alleged infringement. Order made upon such an affidavit, notwithstanding an appln. by deft. that the motion might stand over for the cross-examination of pltf.

In support of his application for cross-examination Mr. Karpal Singh cited the case of *Gomez v. Gomez* [1969] 1 MLJ 228. The issue there was that the applicant was the father of a child in respect of whom the Court had earlier given custody to the mother (respondent) in a divorce proceeding. Both the applicant and the respondent professed the Roman Catholic faith prior to the divorce. After obtaining the divorce the respondent married a Hindu thereupon the applicant made an application to the Court to vary the order of custody of the child on the ground that since the respondent had married a Hindu she was not capable of looking into the said child's religious and moral upbringing as a Roman Catholic. In her response to the allegations of the applicant, the respondent there filed an affidavit asserting that although she was married to a Hindu she continued to practise her religion namely Catholicism and that she attended church on Sunday and other days with the child regularly. The applicant, however, contended that insofar as the Roman Catholic Church is concerned, the respondent having divorced her husband and marrying a Hindu, was living in sin and could not practise the religion while living in sin. In the circumstances Raja Azlan Shah J (as His Royal Highness then was) quite rightly allowed cross-examination on the respondent's affidavit since the issue in the action before His Lordship was whether the custody of the child should be given to the applicant or the respondent in the view of the conflicting evidence concerning the capability of either parent to look after the welfare of the child based on religious ground. The case is therefore distinguishable.

For the above reasons I therefore disallowed the application for the cross-examination on the affidavit of the defendant. I also make an order directing that the costs of the proceeding should be paid to the defendant/respondent.

Also found at [1987] 2 CLJ 316